

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.

TRANSIT CONNECTION, INC.

v.

NATIONAL LABOR RELATIONS BOARD
and AMALGAMATED TRANSIT UNION,
LOCAL 1548

PETITION FOR REVIEW

NOTICE IS HEREBY GIVEN THAT, Petitioner Transit Connection, Inc., by and through its undersigned attorney, hereby petitions the Court for review of the Decision and Order of the National Labor Relations Board (“Respondent”) entered on December 28, 2016. The Decision and Order of the Respondent order Transit Connection, Inc. to recognize and bargain with the Amalgamated Transit Union Local 1548, post notice of the Respondent’s decision, and file a sworn certification of compliance with the Respondent. A copy of said decision is attached hereto as Exhibit “A” and by reference made a part hereof. Petitioner will supplement this Petition for Review with a brief and attachments thereto.

PETITIONER,
By its attorneys,



Mark R. Reich
(Massachusetts Bar No. 553212)
Timothy D. Zessin
(Massachusetts Bar No. 677612)
KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110-1109
(617) 556-0007
mreich@k-plaw.com
tzessin@k-plaw.com


Dated: January 18, 2017

CERTIFICATION

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by overnight mail to the National Labor Relations Board General Counsel's Office at 1015 Half Street SE, Washington, DC 20570-0001 and to the Amalgamated Transit Union Local 1548's office at Amalgamated Transit Union, AFL-CIO/CLC International Headquarters at 10000 New Hampshire Avenue, Silver Spring, MD 20903, this 18th day of January 2017.

Date: 1-18-17

573636/42100/0006



Timothy D. Zessin

Exhibit A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Transit Connection, Inc. and Amalgamated Transit Union Local 1548. Case 01-CA-183197

December 28, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on August 30, 2016, by Amalgamated Transit Union Local 1548 (the Union), the General Counsel issued the complaint on September 14, 2016, alleging that Transit Connection, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 01-RC-145728. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On October 7, 2016, the General Counsel filed a Motion for Summary Judgment. On October 11, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. Thereafter, the Respondent filed a limited opposition to the General Counsel's motion.

Ruling on Motion for Summary Judgment

In its answer to the complaint, the Respondent denies that it has refused to bargain with the Union, but affirmatively states that it intends to test the Board's certification. In addition, in its limited opposition to the General Counsel's motion, the Respondent admits that it has refused to bargain with the Union in order to test the Board's certification of the Union.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business located at 11 A Street, Edgartown, Massachusetts (the Edgartown facility), has been engaged, pursuant to an agreement with The Martha's Vineyard Regional Transit Authority (the Authority), as the transit operator for the Authority along such routes and according to such schedules as defined by the Authority on the island of Martha's Vineyard, Massachusetts.

Annually, the Respondent, in conducting its operations described above, provides bus transportation services to the Authority and the public valued in excess of \$250,000 on the island of Martha's Vineyard.¹ The Authority is a component unit of the Massachusetts Department of Transportation, which is a component of the Commonwealth of Massachusetts, which is directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.²

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following an election held on March 18, 2015, and a second election held on September 10, 2015, the Union was certified on March 15, 2016, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time operators employed by the Employer at its 11 A Street, Edgartown, Massachusetts facility but excluding office clerical employees, managerial employees, dispatchers, mechanics,

¹ The Respondent's answer denies the complaint allegation that it receives at its Edgartown facility goods valued in excess of \$5000 directly from points outside the Commonwealth of Massachusetts. Its answer admits, however, the complaint's other jurisdictional allegations, including that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Therefore, we find that the Respondent's denial does not raise any issues warranting a hearing.

² The Respondent's answer states that it "is without sufficient knowledge to admit or deny" the complaint allegation that the Union is a labor organization within the meaning of Section 2(5) of the Act. The Respondent, however, stipulated to the Union's labor organization status in the underlying representation proceeding, and it is therefore precluded from litigating the matter in this proceeding. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992).

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

confidential employees, seasonal employees, guards and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act.

Edward Pigman	----	President & CEO
Darren Morris	----	General Manager

By letters dated August 9, 2016, and September 9, 2016, the Union requested that the Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the unit. Since about August 9, 2016, the Respondent has failed and refused to do so.³

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.⁴

CONCLUSION OF LAW

By failing and refusing since August 9, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning

³ The complaint additionally alleges that the Union also requested bargaining by letters dated May 17 and 24, 2016. The Respondent's answer denies these allegations, and in the Respondent's limited opposition to the motion for summary judgment, it contends that it never received the Union's May 17 and 24 letters. However, the Respondent admits in its answer that it received the Union's request to bargain dated August 9, and in its limited opposition the Respondent admits that it has failed to bargain with the Union in order to test the Board's certification of the Union. As a determination regarding the date on which the Respondent first received the Union's request to bargain does not affect the remedy, we find it appropriate to rely on the uncontested facts that the Respondent received a bargaining request on August 9, and refused to bargain with the Union thereafter. Accordingly, the Respondent's denials regarding the earlier requests to bargain do not raise issues of fact warranting a hearing.

⁴ Despite the Respondent's denial in its answer that it has refused to bargain with the Union, its assertion that it seeks to test the Union's certification is sufficient to establish a violation of the Act. See *Biewer Wisconsin Sawmill, Inc.*, supra, 306 NLRB at 732 (despite respondent's answer denying that it refused to bargain with the union, its admission that it intended to test the union's certification was sufficient to establish a violation).

of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Transit Connection, Inc., Edgartown, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Amalgamated Transit Union Local 1548 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time operators employed by the Employer at its 11 A Street, Edgartown, Massachusetts facility but excluding office clerical employees, managerial employees, dispatchers, mechanics, confidential employees, seasonal employees, guards and supervisors as defined in the Act, and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Edgartown, Massachusetts, copies of the attached notice marked "Appendix."⁵ Copies of the no-

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

TRANSIT CONNECTION, INC.

3

tice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 9, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 28, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Amalgamated Transit Union Local 1548 as the exclusive collective-bargaining representative of our employees in the bargaining unit.

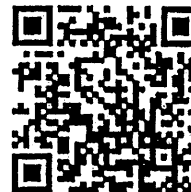
WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All full-time and regular part-time operators employed by us at our 11 A Street, Edgartown, Massachusetts facility but excluding office clerical employees, managerial employees, dispatchers, mechanics, confidential employees, seasonal employees, guards and supervisors as defined in the Act, and all other employees.

TRANSIT CONNECTION, INC.

The Board's decision can be found at www.nlr.gov/case/01-CA-183197 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."